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MAILED

FEB 27 2009

OFFICE OF PETITIONS

In re Application of	:	
Small	:	
Application No. 10/527,747	:	DECISION
Filed: 14 March, 2005	:	
Attorney Docket No. (None)	:	

This is a decision on the petition filed on 3 November, 2008, to revive an application under 37 C.F.R. §1.137(b) as having been abandoned due to unintentional delay.

NOTE: *There is no indication that Petitioner herein was ever empowered to prosecute the instant application. If Petitioner desires to receive future correspondence regarding this application, the appropriate power of attorney documentation must be submitted. A courtesy copy of this decision will be mailed to Petitioner. However, all future correspondence will be directed to the address of record until such time as appropriate instructions are received to the contrary.*

The petition as considered under 37 C.F.R. §1.137(b) is **GRANTED**.

As to Allegations of
Unintentional Delay

The requirements of a grantable petition pursuant to 37 C.F.R. §1.137(b) are the petition and fee therefor, a reply, a proper statement of unintentional delay under the regulation, and, where applicable, a terminal disclaimer and fee. (However, it does not appear that a terminal disclaimer and fee are due here.)

BACKGROUND

The record reflects as follows:

Applicant failed to reply timely and properly to the non-final Office action mailed on 31 October, 2006, with reply due absent extension of time on or before 31 January, 2007.

The application went abandoned after midnight 31 January, 2007

The Office mailed the Notice of Abandonment on 31 May, 2007.

On 17 December, 2007, Applicant filed a petition pursuant to 37 C.F.R. §1.137(a), averring unavoidable delay, with fee, a reply in the form of an amendment, and a statement that he did not receive the non-final Office action or the Notice of Abandonment, and a statement of John Sanderson MD (identified as the “householder at 9 Island View, Irvine, CA 92604) averred that John Sanderson MD “never received an Office action” and the petition avers that this pattern of non-receipt includes the Notice of Abandonment (Petition, page 1, fourth paragraph.). Applicant did not appear to satisfy (with the necessary documentary support under the rule) the showing requirements as to unavoidable delay (e.g., a copy of the docket record or file jacket cover detailing transactions) with an averment of search and failure to find, along with a copy of the due-date calendar for the date on which the timely reply was due for the Office action in question. Of the three mailings—the 19 October, 2006, Office action, the 31 October, 2006, non-final Office action, and the 31 May, 2007, Notice of Abandonment—to Applicant at the address set forth above, Applicant’s petition and the statement of John Sanderson MD (identified as the “householder at 9 Island View, Irvine, CA 92604) avers that John Sanderson MD “never received an Office action” and the petition averred that this pattern of non-receipt included the Notice of Abandonment (Petition, page 1, fourth paragraph.). Applicant’s continued reliance upon this address for Office correspondence might be found not to be reasonable in light of the Applicant’s stated history of non-delivery/non-receipt. Applicant provided no documentation as the requisite support of the averment (pursuant to 37 C.F.R. §1.137(a) or 37 C.F.R. §1.181), as outlined in the discussion at commentary at MPEP §711.03(c), of a petition averring unavoidable delay. The petition was dismissed on 2 September, 2008, for failure to satisfy the showings under the rule.

Petitioner filed on 3 November, 2008, a petition pursuant to 37 C.F.R. §1.137(b), averring unintentional delay, with fee, a reply in the form of an amendment, and made a statement of unintentional delay.

*It is noted that it is not apparent whether the person signing the statement of unintentional delay was in a position to have firsthand or direct knowledge of the facts and circumstances of the delay at issue. As a result, the Office may treat such a statement as having been made as the result of a reasonable inquiry into the facts and circumstances of such delay.¹ In the event that such an inquiry has not been made, a Petitioner **must** make such an inquiry—and if such inquiry results in the discovery that it is not correct that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 C.F.R. §1.137(b) was unintentional, a Petitioner **must** notify the Office.*

¹ See 37 C.F.R. §10.18(b) and Changes to Patent Practice and Procedure; Final Rule Notice, 62 Fed. Reg. 53131, 53178 (October 10, 1997), 1203 Off. Gaz. Pat. Office 63, 103 (October 21, 1997).

The availability of applications and application papers online to applicants/practitioners who diligently associate their Customer Number with the respective application(s) now provides an applicant/practitioner on-demand information as to events/transactions in an application.

Out of an abundance of caution, Petitioners always are reminded that those registered to practice and all others who make representations before the Office are reminded to inquire into the underlying facts of representations made to the Office and support averments with the appropriate documentation—since all owe to the Office the continuing duty to disclose.²

STATUTES, REGULATIONS AND ANALYSIS

Congress has authorized the Commissioner to "revive an application if the delay is shown to the satisfaction of the Commissioner to have been "unavoidable." 35 U.S.C. §133 (1994).³

The regulations at 37 C.F.R. §1.137(a) and (b) set forth the requirements for a Petitioner to revive a previously unavoidably or unintentionally, respectively, abandoned application under this congressional grant of authority.

Unintentional delays are those that do not satisfy the very strict statutory and regulatory requirements of unavoidable delay, and also, by definition, are not intentional.⁴))

As to Allegations of Unintentional Delay

It appears that the requirements under 37 C.F.R. §1.137(b) have been satisfied.

CONCLUSION

Accordingly, The petition under 37 C.F.R. §1.137(b) is **granted**.

The instant application is released to Technology Center/AU 3662 for further processing in due course.

² See supplement of 17 June, 1999. The Patent and Trademark Office is relying on petitioner's duty of candor and good faith and accepting a statement made by Petitioner. See *Changes to Patent Practice and Procedure*, 62 Fed. Reg. at 53160 and 53178, 1203 *Off. Gaz. Pat. Office* at 88 and 103 (responses to comments 64 and 109)(applicant obligated under 37 C.F.R. §10.18 to inquire into the underlying facts and circumstances when providing statements to the Patent and Trademark Office).

³ 35 U.S.C. §133 provides:

35 U.S.C. §133 Time for prosecuting application.

Upon failure of the applicant to prosecute the application within six months after any action therein, of which notice has been given or mailed to the applicant, or within such shorter time, not less than thirty days, as fixed by the Commissioner in such action, the application shall be regarded as abandoned by the parties thereto, unless it be shown to the satisfaction of the Commissioner that such delay was unavoidable.

⁴ Therefore, by example, an unintentional delay in the reply might occur if the reply and transmittal form are to be prepared for shipment by the US Postal Service, but other pressing matters distract one's attention and the mail is not timely deposited for shipment.

Petitioner may find it beneficial to view Private PAIR within a fortnight of the instant decision to ensure that the revival has been acknowledged by the TC/AU in response to this decision. It is noted that all inquiries with regard to that change in status need be directed to the TC/AU where that change of status must be effected—that does not occur in the Office of Petitions.

Telephone inquiries regarding this decision may be directed to the undersigned at (571) 272-3214—it is noted, however, that all practice before the Office is in writing (see: 37 C.F.R. §1.2⁵) and the proper authority for action on any matter in this regard are the statutes (35 U.S.C.), regulations (37 C.F.R.) and the commentary on policy (MPEP). Therefore, no telephone discussion may be controlling or considered authority for Petitioner's action(s).



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⁵ The regulations at 37 C.F.R. §1.2 provide:

§1.2 Business to be transacted in writing.

All business with the Patent and Trademark Office should be transacted in writing. The personal attendance of applicants or their attorneys or agents at the Patent and Trademark Office is unnecessary. The action of the Patent and Trademark Office will be based exclusively on the written record in the Office. No attention will be paid to any alleged oral promise, stipulation, or understanding in relation to which there is disagreement or doubt.